STATE OF MICHIGAN

IN THE SUPREME COURT

SHARDA GARG,

Plaintiff-Appellee/
Cross-Appellant,

vs.

MACOMB COUNTY COMMUNITY MENTAL HEALTH SERVICES, a governmental agency of MACOMB COUNTY,

Defendant-Appellant/
Cross-Appellee.
_____/

Supreme Court No: 121361 & (64)

Court of Appeals No: 223829

Macomb Circuit Court No: 95-3319 CK

121361

SUPPLEMENTAL BRIEF IN OPPOSITION TO MACOMB COUNTY COMMUNITY MENTAL HEALTH SERVICES' APPLICATION FOR LEAVE TO APPEAL

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INTRODUCTION

Plaintiff-Appellee/Cross-Appellant Sharda Garg was awarded $250,000.00 by a Macomb County jury on her claim of unlawful retaliation under the Elliott-Larsen Civil Rights Act, MCLA §37.2701(a); MSA §3.548(701) on April 23, 1998. The Hon. George Montgomery entered Judgment in the amount of $354,298.17, inclusive of interest, costs and attorney fees, on August 17, 1998.[1] Mrs. Garg prevailed on all post-trial motions. Record. The Court of Appeals affirmed in an unpublished per curiam opinion decided 3-29-02, Docket no. 223829. Defendant-Appellant filed its Application for Leave to Appeal on or about April 18, 2002. Mrs. Garg filed a Cross-Application for Leave to Appeal on May 9, 2002, challenging the Court of Appeals' affirmance of the trial court's computation of interest under MCLA §600.6013(1).

This Court's Order dated December 29, 2003 directed the Clerk of the Court to schedule oral argument on the pending applications, and gave the parties permission to file supplemental briefs within 28 days.

Because the Order does not specify which issue or issues the Court would like the parties to address, Plaintiff-Appellee will focus on refuting both of Defendant-Appellee's claims, i.e., that Mrs. Garg failed to establish a prima facie case of unlawful retaliation, and that application of the continuing violation doctrine is inappropriate to the case at bar.

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[1] The case was tried before visiting Judge Roland Olzark, retired Wayne County Circuit Court Judge.

ARGUMENT

I. PLAINTIFF'S PROOFS EASILY ESTABLISHED A PRIMA FACIE CASE OF RETALIATION FOR OPPOSING SEXUAL HARRASSMENT AND COMPLAINING OF DISCRIMINATION, ACTIVITIES CLEARLY PROTECTED BY THE ELCRA.

The trial court denied Defendant's motion for directed verdict, concluding the proofs were sufficient to allow reasonable jurors to find in Plaintiff's favor. Tr 4/8/98 p 802; 4/9/98 p 778; 4/22/98 p 136. The jurors did find in Plaintiff's favor, rendering their verdict on April 23, 1998. The trial court, having carefully reviewed the trial transcript, denied Defendant's motions for judgment notwithstanding the verdict, remittitur, and new trial. Opinion and Order dated 11/3/99. The Court of Appeals unanimously agreed that Plaintiff's proofs sufficiently established a jury question. Garg v Macomb County Community Mental Health, unpublished opinion per curiam of the Court of Appeals, decided 3-29-02 (Docket No. 223829), Slip opinion at 2-3. Nonetheless, Defendant insists that Plaintiff's proofs were insufficient as a matter of law, most recently arguing that West v General Motors Corp, 469 Mich 177, 665 NW2d 468 (2003), reh den 668 NW2d 911 (2003) requires reversal of the decision below.

West, supra articulated the three elements of a prima facie case under the Whistleblowers' Protection Act, MCLA §15.362; MSA §17.428(12), observing that "Plaintiff's whistleblower claim is analogous to an antiretaliation claim based on other prohibited kinds of employment discrimination," 469 Mich at 183-184 and n 11. Those elements are: (1) plaintiff was engaged in protected activity as defined by the act, (2) plaintiff was discharged or discriminated against, and (3) a causal connection exists between the protected activity and the discharge or adverse employment action. Id. Based on the facts before it, this Court concluded that the West plaintiff failed to prove causation, i.e., that "a causal connection exists between the protected activity and the discharge or adverse employment action." 469 Mich at 188.

Factually, however, the case at bar is much more similar to Henry v Detroit, 234 Mich App 405; 594 NW2d 107 (1999), cited with approval in West, supra.

Plaintiff Henry's protected activity was testifying adversely to his employer at a deposition; Mrs. Garg's 1981 protected activity was slugging Donald Habkirk, her supervisor's supervisor, when he approached and touched her from behind, after seeing him approach other female employees from behind and snap their brassieres or touch their underpants, thus expressing opposition to his sexual harassment of other employees. Mrs. Garg's 1987 protected activity was filing a grievance, alleging that she was being denied promotions on the basis of her national origin or color. Tr. 4/2, pp. 74-75; Exhibits 113, 115. Mrs. Garg's 1994 protected activities were writing to Habkirk (by then, director of the agency) requesting an investigation into why she had never been promoted, and having her attorney send a retention letter a few months later.

Like Henry, Mrs. Garg suffered discrimination following her protected activities: her performance rating was downgraded just before the next promotional opportunity following the slugging incident, and she did not get that promotion or any other promotion she ever applied for. After filing her 1987 grievance, her supervisor, Kent Cathcart, refused to allow Mrs. Garg to participate on a committee of other psychologists (although he'd criticized her for not participating in workplace activities), and in addition micromanaged and criticized her to such an extent that his treatment of her became a joke amongst the staff. Tr 4/2/98 p 84-87, 94-99, 134-135. In late 1994 (following the 1994 letters from Mrs. Garg and her attorney to Donald Habkirk), the "LCC" facility where Mrs. Garg worked was closed and the employees were re-assigned to different locations. Tr 4/2/98 p 61. Mrs. Garg was the most senior staff member assigned to the "First North" facility: in fact, she had more seniority than her new supervisor, Tom Miller. Tr 4/3/98 p 185, 187. Nonetheless, she was the only therapist given an office with

no carpeting and no windows, which was in fact an old storage closet sharing a wall with the bathroom, despite the fact that there were other vacant offices in the building. Tr 4/3/98 p 183-190. Miller, who reported to Habkirk, continuously harassed Mrs. Garg to the point that she received four memos criticizing her in a single day. Id.

Like Henry, Mrs. Garg had an exemplary work record before she engaged in protected activity: she had never been reprimanded, no negative action had ever been taken against her, and her performance reviews were either "very good" or "outstanding." She enjoyed a cordial relationship with Habkirk, who admitted she was a good employee. Following Mrs. Garg's forceful resistance to Habkirk's touching, he immediately became cold toward her. Habkirk remained in Mrs. Garg's chain of command, and became Director of Defendant agency as of 1986. Tr 4/2/98 p 16; Tr 4/3/98 p 159-160. At one point Mr. Garg was told his wife was not being promoted because Habkirk didn't like her. She was repeatedly rejected for promotional positions for which she was as or more qualified than other employees, yet over the years she continued to receive "outstanding" and "very good" job evaluations, Tr 4/2/98 p 80-83, Tr 4/3/98 p 201-204, and had been recommended for promotion by at least one supervisor, Id. p 123-126. The jury could reasonably conclude that Habkirk stonewalled Mrs. Garg's career development in retaliation for her opposition to sexual harassment by hitting him, and/or that he and Kent Cathcart retaliated because Mrs. Garg had the temerity to file a grievance and/or request an investigation of why she was not being promoted.

Causation in this case, as in Henry, was a question properly left to the jury. 234 Mich App at 414. Plaintiff submits that to hold causation is lacking ***as a matter of law*** based on the length of time between the protected activities and the adverse employment consequences would be as inappropriate as finding causation to be present as a matter of law based only on a close temporal relationship, which this Court eschewed in West, supra.

II. THE CONTINUING VIOLATION THEORY AS SET FORTH IN SUMNER v GOODYEAR TIRE & RUBBER, PROPERLY HELD APPLICABLE TO THE CASE AT BAR, SHOULD REMAIN VIABLE IN MICHIGAN.

The retaliation suffered by Mrs. Garg "unfolded" over a period of years. The retaliatory conduct began with Habkirk's coldness toward plaintiff after the slugging incident, and continued over time to encompass a lengthy series of adverse employment actions. Sumner v Goodyear Tire & Rubber Co, 427 Mich 505, 526; 398 NW2d 368 (1986); Garg, supra, Slip op. p 4; trial court's Opinion and Order dated 7/10/96. The Court of Appeals opined that the "series of events" sub-theory of continuing discrimination set forth in Sumner was most analogous to the case at bar. Slip op. p 4. Indeed, like the discrimination suffered by plaintiff Sumner, Defendant's actions herein involved the same subject matter: retaliation for plaintiff's opposition to Elliott-Larsen violations by repeated denials of promotion, compounded by microsupervision and harassment following the 1987 grievance and the 1994 communications to Habkirk. The retaliatory acts were not occasional or random, but occurred frequently and regularly: denial of all 18 promotions sought by Mrs. Garg over 15 years, almost constant harassment by Cathcart after the 1987 grievance was filed, and similar treatment by her new supervisor, Miller, after the 1994 letters to Miller's boss, Habkirk. And, like harassment, the nature of retaliation is that it ceases once the intent to retaliate ends; it does not provide notice of subsequent neutrally initiated injuries. Sumner, supra, 427 Mich at 538-539. Here, the jury might well have concluded that Habkirk's retaliatory animus would not cease until Mrs. Garg quit her job or won her lawsuit.

The analysis of whether the retaliatory acts herein were part of a continuing series of events as opposed to discrete violations is related to the question of whether this Court should adopt and apply National Railroad Passenger Corp v Morgan, 536 US 101, 122 SCt 2061, 153 L

Ed2d 106 (2002) to cases arising under Michigan's anti-discrimination laws. Morgan held that "a Title VII plaintiff raising claims of 'discrete discriminatory or retaliatory acts' must file his charge within the [statutory] time period, but a 'hostile work environment claim' will not be time-barred so long as 'all acts which constitute the claim are part of the same unlawful employment practice' and at least one act falls within the time period." 536 U.S. at 122. By defining 'hostile environment claims' as by nature involving 'repeated conduct' and 'a series of separate acts that collectively constitute one 'unlawful employment practice,' Id at 115-117, it can be virtually impossible to determine when, in practice, there has been a series of incidents that comprise one unlawful employment practice, as opposed to several discrete discriminatory acts that each has its own limitations period. The distinction becomes more difficult when one considers that the acts that collectively comprise the unlawful employment practice may, or may not be, separately actionable. Id. at 115.

The guidelines provided by the Supreme Court for assessing whether an actionable hostile work environment "continuing violation" claim exists are:

(a) Look to "all the circumstances;"

(b) What is the frequency of the conduct?

(c) What is the severity of the conduct?

(d) Is the conduct physically threatening or humiliating?

(e) Is the conduct a "mere offensive utterance"?

(f) Does the conduct unreasonably interfere with an employee's work performance?

(g) Do the pre-and post-limitations period incidents involve the same type of employment actions?

(h) Have the actions occurred relatively frequently?

(i) Were the actions perpetrated by the same managers?

Id. at 116-117, 120. Based on these criteria, termination of employment, failure to promote, denial of transfer and refusal to hire can in reality be either "discrete acts" or part of a continuing employment practice under the circumstances of a particular case, despite the Court's categorization of them as "easy to identify" discrete acts, only. Id. at 114.

In Sumner, for example, plaintiff Robson's repeated denials of transfer were viewed by this Court as a continuing violation resulting from the repeated application of a discriminatory medical guideline. 427 Mich at 534-537. And, while a termination is typically a discrete, non-recurring event, Plaintiff Sumner's termination was so "intrinsically connected" to the racial harassment preceding it that the continuing violation doctrine was properly applied. Id. at 539-542. Thus, this Court has specifically determined both termination and denial of transfer to be actionable as continuing violations under the circumstances of particular cases.

Similarly, in the case at bar, an examination of all the circumstances reveals the retaliatory conduct to which Mrs. Garg was subjected was frequent, severe in that it sabotaged her career advancement, humiliating because every other psychologist but her had been promoted at least once during their tenure with Defendant, the adverse actions were of the same type in the pre- and post-limitations periods, and the manager to whom she expressed her opposition remained the ultimate decision-maker at all pertinent times. This Court should therefore not adopt a rule of law that precludes inclusion of failure to promote (or denial of transfer, etc.) in an "unlawful employment practice" for purposes of the continuing violation doctrine.

While this Court can adopt federal precedent or turn to it for guidance in interpreting Michigan's civil rights laws, as in Sumner, 427 Mich at 525, it is certainly not compelled to do so. Haynie v Dept of State Police, 468 Mich 302, 319-320; 664 NW2d 129 (2003); Chambers v Trettco, Inc, 463 Mich 297, 313-314; 614 NW2d 910 (2000). As this Court recently observed,

although the Elliott-Larsen Civil Rights Act may be similar to Title VII, it need not be made identical nor must it be interpreted to mean exactly the same thing. Haynie, supra at 319-320. To adopt the principles announced in Morgan would represent a significant change in Michigan jurisprudence, requiring this Court to overrule Sumner and its progeny. However, there is no good reason to do so. Sumner established an approach to and analysis of continuing violation cases that has become entrenched in Michigan jurisprudence and has stood the test of time.[2] In fact, this Court cited Sumner as recently as July, 2003 in Collins v Comerica Bank, 468 Mich 628, n 3; 664 NW2d 713 (2003), reh den 668 NW2d 357 (2003). The holding of Morgan is not compelled by the text of Title VII, nor is it compelled by the text of the ELCRA. Nothing in the ELCRA requires that the continuing violation doctrine be limited to hostile environment cases, or implies that it is inappropriate to apply the doctrine to any other continuous series of discriminatory acts such as repeated failures to promote or denials of transfer. Plaintiff urges this Court to decline Defendant's invitation to adopt Morgan, and to leave untouched the Court of Appeals ruling that the continuing violation doctrine applies to the case at bar.

CONCLUSION AND RELIEF REQUESTED

Plaintiff-appellee cross-appellant Sharda Garg proofs were unquestionably sufficient to present a prima facie case of ELCRA retaliation for jury determination. The retaliation unfolded over time as a continuous series of acts that together constituted one unlawful employment practice.

Based on the argument and authorities set forth in this brief, together with her principal Brief in Response to Application for Leave to Appeal and her Response to Supplemental

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[2] A Westlaw search conducted January 25, 2004 reveals Sumner has been favorably cited in 120 cases, most of which are Michigan cases.

Authority Submitted by Defendant-Appellant, Mrs. Garg urges this Court to deny the pending Application for Leave in all respects.

RESPECTFULLY SUBMITTED,

Dated: January 28, 2004

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